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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of CARL A. WESCOTT
and MONETTE R. STEPHENS.

CARL A. WESCOTT,

Appellant,

v.

MONETTE R. STEPHENS,

Respondent.

A151786

(City & County of San Francisco
Super. Ct. No. FDI-14781666)

Since June 2014, Monette R. Stephens and Carl A. Wescott have been embroiled in a long and contentious dissolution and child custody dispute. On May 1, 2017, the trial court granted a request by Stephens to declare Wescott a vexatious litigant and to prohibit him from filing any new litigation, including new motions in the present dispute, in propria persona without first obtaining leave of court. Wescott, appearing in propria persona on appeal, contends the court's order is not supported by substantial evidence and that the court violated his right to due process by declaring him a vexatious litigant based on a statutory definition and evidence not relied on in respondent's moving papers. We find no error and affirm the court's order.

Factual and Procedural History¹

On November 4, 2016, Stephens filed a request to declare Westcott a vexatious litigant. Following a hearing and briefing, the court granted the request. After taking judicial notice of the 15 volumes of documents filed in the custody proceedings, the court set forth the following facts: “In this case alone, there was a total of 93 requests for orders (hereafter ‘RFO’) and/or requests for order to show cause (hereafter ‘OSC’) filed by both parties, of which Wescott filed 80 out of the 93 filings. [¶] Since August of 2014, Westcott filed fifty-five (55) RFOs and twenty-five (25) OSCs. Forty Five (45) of his RFOs were denied and all twenty-five (25) of his OSC requests were denied. [¶] Recently, Westcott filed two more requests for an OSC on Jan 25, 2017 and Oct 12, 2016; both of which were denied. [¶] On July 7, 2015 the court held: ‘*Petitioner [Westcott] has repeatedly abused the legal process in order to drive up the cost of litigation and to harass the respondent [Stephens]; Petitioner [Westcott] has not been truthful or candid with the court; [and] petitioner [Westcott] appears to have forged documents and has back-dated documents.*’ [¶] On May 2, 2016 the court found that ‘*there is a tendency for petitioner [Wescott] to abuse the process to get things done in a timely manner and with a smooth flow.*’ [¶] In addition Wescott has filed, either personally or under the name of a third party, multiple additional suits naming [Stephens] as a defendant as follows: [¶] 1. San Francisco Superior Court unlawful detainer action, case No. CUD 14 650652; filed by ‘Carl Wescott Revocable Trust’ seeking to evict [Stephens] and their 3 minor children from the marital home The court granted [Stephens’s] motion to quash the summons and complaint on Nov 21, 2014. [¶] 2. Sacramento Superior Court civil action, case No. 34 2014 00272169; filed by

¹ Wescott opted to proceed without a reporter’s transcript and designated only the following documents for inclusion in the clerk’s transcript: the register of actions, the order appealed from, the notice of appeal and the notice designating the record on appeal. While Wescott also attempted to designate the request for an order filed by Stephens, the designation was written in the wrong section of the form. As discussed below, the absence of this document in the record is not prejudicial. Accordingly, there is no need to augment the record.

‘Melissa Cardiff’ against [Stephens] for breach of contract to repay a loan taken by Wescott; it was never served upon [Stephens]. [¶] 3. San Francisco Superior Court civil harassment restraining order action, case No. CCH 14 576171; filed under the name of ‘Tony Carracci’; the matter was dismissed without prejudice when neither party appeared on Oct 8, 2014. [Stephens] had no knowledge of the action on Oct 8, 2014. [¶] 4. San Francisco Superior Court small claims action, case No. CSM 15 848839, for property [Stephens] allegedly retained when Wescott left the [family home]; dismissed without prejudice on March 4, 2015. [¶] 5. U.S. Bankruptcy Court, Northern District of Georgia, case No. 12-71903-lrc; the initial debtor is Danielle Marie Cochran with Wescott and [Stephens] named as co-debtors. [Stephens] was recently served with a notice of filing of a motion by ‘co-trustee Carl Wescott Revocable Trust’ on Oct 12, 2016 asking for relief from an automatic stay as to the family home That motion was filed during the trial, held Oct 11 and 13, 2016, on the reserved issue addressing that very property. [¶] 6. U.S. Bankruptcy Court, Northern District of California, case No. 16 10905; recently filed by Wescott as an individual. [¶] 7. Several international lawsuits in Uruguay, Ecuador, and Honduras; Westcott confirmed his involvement in emails to [Stephens’s] counsel accusing [Stephens] of ignoring the suits.” (Fns. omitted.)

Based on the above facts, the court concluded that Wescott “repeatedly pursued unmeritorious or frivolous tactics in litigation against [Stephens] in numerous courts and jurisdictions.” The court explained, “[T]he history of litigation in this 2-year and 10-month old case shows that Wescott had filed numerous unmeritorious motions and requests for contempt against [Stephens], as well as numerous lawsuits in federal court, other state courts and foreign jurisdictions against [Stephens], including filing a motion in the Georgia Bankruptcy Court that would affect issues that were being tried in this case at the time of that filing. [¶] Every motion or request for OSC filed by Wescott forced [Stephens] to appear in court and respond to the person from whom she was granted protection in a restraining order that required Wescott to stay 100 yards away from her.” Attached to the order is a document summarizing Wescott’s filings in the present action

and setting forth the relief sought by the request, whether the request was successful and, when appropriate, a short explanation for the court's ruling.

Wescott timely filed an application for permission to appeal.² Following the granting of his application, Wescott filed his notice of appeal.³

Discussion

The vexatious litigant statutes “ ‘are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants.’ ” (*In re Marriage of Rifkin & Carty, supra*, 234 Cal.App.4th at p. 1345.) As relevant here, a “vexatious litigant” is defined in Code of Civil Procedure⁴ section 391, subdivision (b)(1) as a person who “[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.” Alternatively, section 391, subdivision (b)(3) defines a “vexatious litigant” as a person who, while acting in propria persona, “repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.” Under section 391.7, subdivision (a), the court may “enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of

² Wescott's application for permission to appeal includes a number of documents that are not contained in the appellate record, including the memorandum of points and authorities filed by Stephens in support of her request for order declaring Wescott a vexatious litigant.

³ Stephens has not filed a respondent's brief on appeal. We do not treat the failure to file a respondent's brief as a default. Wescott, as the appellant, still bears the affirmative burden to show error. (*In re Marriage of Rifkin & Carty* (2015) 234 Cal.App.4th 1339, 1342.)

⁴ All statutory references are to the Code of Civil Procedure unless otherwise noted.

the court where the litigation is proposed to be filed.” For purposes of the prefiling order, new “litigation” includes “any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code . . . for any order.” (§ 391.7, subd. (d).)

“ ‘ “A court exercises its discretion in determining whether a person is a vexatious litigant. [Citation.] We uphold the court's ruling if it is supported by substantial evidence. [Citations.] On appeal, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment.” ’ ’ ” (*In re Marriage of Rifkin & Carty*, *supra*, 234 Cal.App.4th at p. 1346.)

Initially, Wescott contends his due process rights were violated because Stephens requested the order under the definition of a vexatious litigant found in section 391, subdivision (b)(1) but the court relied on the subdivision (b)(3) definition in granting the motion. He argues that he was not given sufficient notice “because the court decided the issue on grounds not briefed by the parties.” Because the request for order is not in the appellate record, we have no means of confirming the statutory basis on which the request was made. However, Stephens’s memorandum in support of her request, which was attached as an exhibit by Wescott to his application to file an appeal, specifically argues that Wescott meets the definition of a vexatious litigant under section 391, subdivision (b)(3) and details Wescott’s “abusive tactics employed in the instant case.” Accordingly, this document necessarily establishes that Wescott was given adequate notice of the statutory definition against which his conduct was being measured.

Wescott also contends that the court improperly assumed all of his unsuccessful filings were unmeritorious filings and applied a “pure arithmetic computation” in granting the request. He argues further that “[a]pplying the vexatious litigation statute based on the sheer number of visitation filings is inconsistent with construing CCP 391 narrowly” and, thus, violated his constitutional right of access to the courts. Section 391, subdivision (b)(3) “does not specify either a time frame or quantity of actions necessary to support a vexatious litigant finding What constitutes ‘repeatedly’ and ‘unmeritorious’ under subdivision (b)(3), in any given case, is left to the sound discretion of the trial court.” (*Morton v. Wagner* (2007) 156 Cal.App.4th 963, 971.) In this case, the

sheer number of motions filed by Wescott satisfies the requirement that the litigant filed repeated motions and the observations by other courts having presided over those disputes establish that at least a significant number of the motions were unmeritorious, frivolous and/or intended to cause delay. Accordingly, substantial evidence supports the court's finding that Wescott is a vexatious litigant under section 391, subdivision (b)(3).

Citing *Morton v. Wagner*, *supra*, 156 Cal.App.4th at page 971, Wescott contends that the court abused its discretion in considering the restraining order entered against him as a factor in support of its decision. In *Morton* the court held that evidence of "ongoing harassment is irrelevant to the vexatious litigant designation. Only the quantity and quality of the litigation promulgated by the respondent is relevant to that question." (*Ibid.*) Arguably, the restraining order against Wescott is relevant in this case because it supports the trial court's finding that Wescott's repeated motions were frivolous and filed with the improper purpose of harassing Stephens. However, even assuming the restraining order was irrelevant, given "the quantity and quality of the litigation promulgated" by Wescott, there is no likelihood that the court's consideration of the restraining order was prejudicial.

Finally, Wescott contends that many of the other lawsuits identified by the court do not qualify under section 391, subdivision (b)(1) because they were not "commenced, prosecuted or maintained" by him or were filed in small claims or bankruptcy court. Initially, we note that the appellate record is largely insufficient to review this claim. In any event, we need not address this claim because, as discussed above, the order was properly entered under the alternative definition of a vexatious litigant found in section 391, subdivision (b)(3).

Accordingly, we find no error in the court's order.

Disposition

The order declaring Wescott a vexatious litigant and imposing a prefiling requirement under Code of Civil Procedure section 391.7 is affirmed.

POLLAK, P. J.

WE CONCUR:

TUCHER, J.

BROWN, J.

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